STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: AUGUST 04, 2022

IN THE MATTER OF:
Appeal Board No. 622067 A

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 622067A and 622068A, the Appeal Board, on its motion pursuant to Labor Law

§ 534, has reopened and reconsidered Appeal Board Nos. 618566A and 628567A,

filed January 20, 2022, which adhered to Appeal Board Nos.615060 and 615061, which affirmed the decisions of the Administrative Law Judge and sustained the initial determination holding, effective June 29, 2020, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10); charging the claimant with an

overpayment of Federal Pandemic Unemployment Compensation of $2400.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and charging the claimant with an overpayment of Lost Wages Assistance benefits of $1800.00 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5).

By order filed April 29, 2022, the Board remanded the case to the Hearing Section for a hearing. The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard at which testimony was taken. There was an appearance by the claimant.

Upon consideration of the entire record, the Board makes the following

FINDINGS OF FACT: The claimant worked as a substitute teacher for the New York City Department of Education (NYCDOE) during the 2019-2020 school year. Due to the COVID-19 pandemic, on March 18, 2020, the NYCDOE closed the physical school buildings. The NYCDOE opened REC centers to provide half-day in person learning for those students who could not attend classes remotely. The claimant received an email from the NYCDOE advising her that REC jobs were available from March 23, 2020, through April 8, 2020. It also stated that work for substitutes was limited and that there were substitutes who did not have work at that time and would not have work in the foreseeable future. There was no follow-up communication regarding openings over the summer period in the REC centers to the claimant.

In June 2020, NYCDOE proposed that the schools would reopen under a three-prong system; in person, remote; and remote/in-person. On June 17, 2020, the claimant was sent a letter purporting to offer the claimant reasonable assurance of work in the 2020-2021 school year, under substantially the same conditions she had experienced in the 2019-2020 school year. The claimant had worked 45 days in the 2019-2020 school year and earned $8383.09. She obtained that employment through a school administrator.

The claimant received an email during the summer 2020, which advised her that there would be hiring freezes. In July 2020, she received another email from the Chancellor that there would be a $100 million dollar budget cut for the NYCDOE. On August 13, 2020, she received a survey from the NYCDOE which noted that the survey was not a guarantee of employment, and which spoke of it being "unprecedented times". There were repeated press conferences reporting that the governor and mayor of NYC were arguing as to whether NYC schools would reopen. The claimant received no communication as to when or if or how schools would reopen for the 2020-2021 school year. She did not receive her license renewal paperwork until September 2, 2020.

Schools reopened on September 18, 2020.

The claimant received the benefits at issue.

OPINION: Pursuant to Labor Law §590 (10), reasonable assurance exists when the

employer expresses a good-faith willingness to consider the possibility of offering per diem work to the claimant and the economic terms and conditions

in the new school year are not expected to be substantially less favorable than in the prior year. It is the responsibility of the employer to demonstrate with competent testimony from witnesses with knowledge of the employer's personnel practices and procedures that these basic conditions have been met. Absent proof that these conditions have been satisfied there is no reasonable assurance of employment in instructional capacity as a per diem substitute teacher (See Appeal Board Nos. 552093 and 551885).

The United States Department of Labor Employment & Training Administration Unemployment Insurance Program Letter (UIPL) 5-17, dated December 22, 2016, gives guidance with respect to interpreting the meaning of reasonable assurance under Sections 3304(a)(6)(A)(i) - (iv) of the Federal Unemployment Insurance Tax Act (FUTA). Pursuant to UIPL 5-17, in order for a claimant to have reasonable assurance in the following year or term, the offered employment must satisfy three prerequisites: (1) the offer of employment may be written, oral, or implied, and must be a genuine offer; that is, an offer made by an individual with actual authority to offer employment; (2) the employment offered in the following year or term, or remainder of the current academic year or term, must be in the same capacity; and (3) the economic conditions of the job offered may not be considerably less in the following academic year or term (or portion thereof) than in the first academic year or term (or portion thereof). The Department interprets "considerably less" to mean that the economic conditions of the job offered will be less than ninety percent of the amount the claimant earned in the first academic year or term.

In the case at hand, the claimant offered testimony that repeated communications from the NYCDOE informed her of the unprecedented times facing the DOE, that there was going to be a major budget cut for the NYCDOE, and that there was a hiring freeze being considered. Press conferences reported the possibility of schools not reopening. Further, the claimant received no communication as to when and if or how school would reopen in the 2020-2021 school year. She did not receive any communication regarding her license renewal until September 2, 2021. This air of uncertainty negated any assurance that the claimant would be rehired for the 2020-2021 school year or that she bona-fides of the letter of June 17, 2020, could be fulfilled.

Under these circumstances, we conclude that the claimant did not have reasonable assurance of continued work under substantially the same conditions in the 2020-2021 school year. She was entitled to the benefits she received.

DECISION: The decisions in Appeal Board Nos. 618566A and 628567A and 615060 and 615061, are rescinded.

The decisions of the Administrative Law Judge is reversed

The initial determinations, holding, effective June 29, 2020, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10); charging the claimant with an

overpayment of Federal Pandemic Unemployment Compensation of $2400.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and charging the claimant with an overpayment of Lost Wages Assistance benefits of $1800.00 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), are overruled.

The claimant is allowed benefits with respect to the issues decided herein.

JUNE F. O'NEILL, MEMBER